OA 3-2.95

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DEPARTMENT OF CHILDREN
AND FAMILIES,
Petitioner,

v.

ROSHONDA KEYS GAINES,
Respondent.
_____/

CASE NO. 93,275
5th DCA Case No. 97-1532

PETITIONER'S INITIAL BRIEF

JAMES A SAWYER, JR.
FLORIDA BAR NO 221031
DISTRICT LEGAL COUNSEL
DEPARTMENT OF CHILDREN
AND FAMILIES
400 W. Robinson Street
Suite S-1106
Orlando, Florida 32801
Phone: (407) 245-0530

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND OF THE FACTS

This case originated as a dependency case in the juvenile division of the Circuit Court in Orange County, Florida. The case ultimately led to the filing by the agency of a petition to terminate parental rights with respect to the Mother's three older children. This petition was granted after trial on the merits, and the Mother appealed. The Fifth DCA affirmed as to the two older children. As to the youngest of the three children, the DCA reversed the termination and also vacated the adjudication of dependency of this child. With respect to this child, the termination petitions had been based on the danger of future harm to the child.

The two older boys, W.K. and T.K., born in 1989 and 1991, where taken into agency custody when they were found, in 1993, wandering the streets one morning on a heavily traveled thoroughfare, and were adjudicated dependent(R 1-3;13). The third child, L.K., born in 1994, came into state custody in 1996 following a home visit of the older boys(R 279-282). During this visit the older boys were physically abused, resulting in criminal convictions of the Mother and her husband for aggravated child abuse (Transcript, 8)

Rather late in the dependency process the Mother and her husband had another child, a girl, who was nine months

old at the time of trial. This child was not the subject of any judicial proceedings.

The DCA affirmed the termination as to the two older boys, and this affirmance is not the subject of any cross-petition before this Court. The termination and adjudication of dependency of the youngest boy were reversed. In entering this reversal the DCA held that there must be a showing that the behavior of the parents presenting the threat of future harm was beyond the parents control. This petition for review followed.

SUMMARY OF ARGUMENT

VOLUNTARY ABUSIVE CONDUCT BY PARENTS AGAINST OLDER CHILDREN MAY BE CONSIDERED BY THE JUVENILE COURTS AS A BASIS FOR FINDING YOUNGER UNABUSED CHILDREN AT RISK OF ABUSE FOR PURPOSES OF DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS.

The decision of the lower tribunal conflicts with the decision of this court in Padgett in that the lower tribunal has imposed an additional requirement to those laid down in Padgett. The decision below affords children protection from harm which the parents cannot help causing, but denies protection to children who suffer from the persistent and voluntary abuse or neglect of their parents. Padgett explicitly held that the abuse of other children could serve as a basis for the termination of parental rights of a child who had not yet been abused.

The definition of neglect, s. 39.01(36), Fla. Stat.(1997)(now 39.01(46), includes a prohibition of conduct placing the children at risk of future harm, and makes no exception for voluntary parental conduct.

The prime purpose of Chapter 39 is to protect children from harm at the hands of their custodians. In affording this protection, and in selecting the remedies to provide it, the issue of whether the harmful conduct is beyond the custodian's control is a relevant but not a controlling issue. The controlling issue should be will it continue and is it significant. These factual issues are best determined and weighed by the trial judge, and should not be second-guessed on a doctrinaire basis in an appellate court.

ARGUMENT

VOLUNTARY ABUSIVE CONDUCT BY PARENTS AGAINST OLDER CHILDREN MAY BE CONSIDERED BY THE JUVENILE COURTS AS A BASIS FOR FINDING YOUNGER UNABUSED CHILDREN AT RISK OF ABUSE FOR PURPOSES OF DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS.

This court, in *Padgett v. Department of Health and Rehabilitative Services*, 577 So. 2d 565 (Fla. 1991) considered the issue of whether a termination of parental rights of one child could be based on the prior abuse or neglect of a different child, and concluded that it could.

> "...[w]e hold that the permanent termination of a parent's rights in one child under circumstances involving abuse or neglect may serve as grounds for permanently severing the parent's rights in a different child." *Padgett*, 577 So. 2d @571.

By necessary implication, the less intrusive remedy of adjudication of dependency , when appropriate, also may be entered with respect to a child who has not yet been abused, based on the prior abuse of children being raised by the same custodians.

In the normal course of events, one hopes that the parental conduct giving rise to a dependency action is the result of lack of education and training which can be

provided, mental or emotional disorder which can be treated, or developmental or physical disability which can be remedied. *Padgett* calls for genuine efforts to provide a remedy for the distressed family.

There remains the possibility that the abuse or neglect by the parent is not the product of these conditions, but results simply from the persistent voluntary behavior of the parent, unaltered by the long-term efforts of the state to change these behaviors. Children of such parents are just as worthy of the state's care and protection as are children of parents with a more socially acceptable defect.
The requirement that the parent's behavior be beyond their control is contrary to Padgett and without foundation in the statutes. It is also irrational. Willfully abusive or neglectful behaviors call for more severe condemnation than do involuntary actions.

After several years of working on a performance plan, and even substantially complying with that plan, the Mother nevertheless engaged in voluntary conduct resulting in her conviction of aggravated child abuse. At the trial of the termination case, the evidence of the mental health professional was that there was nothing wrong with her except perhaps a little depression. This was a mother who could succeed, but would not. Over a period of years she

proved she would not. The trial judge was clearly and convincingly persuaded. The DCA even affirmed the termination as to the two boys who had already suffered her abuse, Significantly, the Fifth affirmed these terminations without a finding that the abuse of *these* two children was due to any condition beyond the parents control.

(One is very tempted to speculate that the "beyond the parent's control" criteria is an attempt to assess the likelihood of repetition, and to avoid terminations based on mere speculation. These are worthy goals. This particular vehicle is inadequate to serve that purpose.)

The cases cited by the lower tribunal give scant support to the requirement that the conduct of the parent be beyond their control. In *Denson v. Department of Health and Rehabilitative Services,* 661 So.2d 173 (Fla. 5th DAC 1995) the court explained that the abuse of one child could serve as the basis of termination of another:

> "This has generally been based on evidence that the abusive or neglectful parent suffers from a condition that makes the prospect of future abuse or neglect of another child highly probable. *Denson at 935.*

There is no language suggesting that the condition be beyond the control of the parent.

In *Williams v. Department of Health and Rehabilitative Services, 648 S0.2d 841* the court dealt with a family with drug and other problems; the Fifth quoted the trial court's finding that the drug problem could not be broken "without a significant commitment to counseling", and "neither the mother nor Gary Williams have made that commitment..." Williams at 843, clearly suggesting that the condition was *not* beyond the parents control, and that their failure to control it was a major consideration in the termination.

In *Richmond v. Department of Health and Rehabilitative Services,* 658 So. 2d 176 (Fla. 5th DCA 1989), the court said:

> "The testimony at the adjudicatory hearing demonstrated a nexus between the mother's mental health problems and her potential harm to the child. Richmond at 177.

The First DCA case *In the Interest of T.D.,* 537 So. 2d 173 (Fla. 1st DCA 1989) does little to support this novel theory, as the First found the mother'' mental illness to be beyond her control, and then nevertheless reversed the termination.

With respect to the young boy L.K., all requirements of the statue and of *Padgett* were met, except the additional conflicting requirement that the abusive behavior not be the mother's fault. Amazingly, the Fifth did more than reverse

the termination of parental rights. That court also vacated the adjudication of dependency, and completely removed this child from the protection of the court.

The mother had abused and neglected the two older siblings, had been convicted of aggravated child abuse, and had persistently failed or refused to alter her behavior. The criminal abuse occurred after substantial efforts to rehabilitate the family. The prior abuse and the nexus were present and clearly convincing.

The phrase "beyond the (actor's) control" has not been at term of art in dependency proceedings, or even legal proceedings generally. The law understands acts which are "voluntary", or "coerced", or "unduly influenced" as these terms have evolved in their respective settings. These terms are applied to acts in question, rather than the general character of the actor. In the present case, there was no question that the abusive acts toward the other children were voluntary (and therefore culpable), the trial judge's problem was to determine if the character of the mother was such that they would continue and become directed to the young boy. The mother had abused and neglected the siblings at roughly the same age as the child L.K. at the time of termination, and the mother had not changed.

Juvenile judges should not be called upon to decide whether substance abuse is beyond the addict's control, *Williams*, supra or pedophilia beyond the control of the pedophile. The case of *Palmer v. Department of Health and Rehabilitative Services*, 547 So.2d 981 (Fla. 5th DCA), cause dismissed 553 So. 2d 1166(1989), in the opinion and dissent, shows that experts can and do disagree on whether pedophilia generally, or a particular case, is treatable. The same situation arises with drug or alcohol addiction, schizophrenia and other mental disorders. These conditions routinely relapse when the patient fails to follow the treatment procedures.

It is reasonable to expect a trial judge to look for a nexus between the condition or character of a parent and the possibility of harm to a child, and it is reasonable to expect a trial judge to consider the evidence and evaluate the likelyhood that the possible harm will materialise. It is neither reasonable not necessary to expect a trial judge to be able to resolve dificult and unsettled questions about the nature of various physical, mental, or character disorders.

The lower tribunal also speculated that because there was no judicial proceeding with respect to the Mother's youngest child, a nine-month-old girl, that this somehow

undermined the risk to the youngest boy. The trial judge found risk to that boy, and the safety of the infant girl was not before him. There was no occasion for *the record in this case* to treat risk to that child and the similarities or differences that might exist. In its speculations, the lower tribunal, in view of the trial court's findings, would have done better to protect the girl (by ordering investigation or intervention) rather than abandon the boy.

CONCLLUSION

This court should:

1. Quash that portion of the opinion below which requires an involuntary parental condition as a condition precedent to the termination of parental rights of a child not yet harmed when other children of the family have already been harmed, and

2. Reverse the reversal of the termination of parental rights and adjudication of dependency of the youngest boy, or at least reverse the vacation of the adjudication of dependency of this child.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail to Ava Tunstall, Esquire, 540 E. Horatio Ave., Ste. 101, Maitland, Florida 32751 and David McDonald, GAL, 170 W. Washington St., Orlando, Florida 32801 this 19th day of October, 1998.

JAMES A SAWYER, JR.
FLORIDA BAR NO 221031
DISTRICT LEGAL COUNSEL
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400 W. Robinson Street
Suite S-1106
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FONT CERTIFICATION

I hereby certify that the Appellant's Initial Brief filed in this cause has been typed in Courier New 12 point font.

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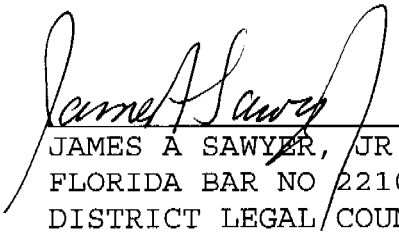

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